

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Application of)	
)	
PAGING SYSTEMS, INC.)	FCC File No. 0002232564
)	
Petition to Deny filed by Warren C. Havens,)	
Intelligent Transportation & Monitoring Wireless)	
LLC, Telesaurus-VPC, LLC, and Telesaurus)	
Holdings GB LLC)	

ORDER ON RECONSIDERATION

Adopted: March 7, 2007

Released: March 8, 2007

By the Chief, Mobility Division, Wireless Telecommunications Bureau:

1. *Introduction.* We have before us a Petition for Reconsideration (Petition) filed jointly by Warren C. Havens, Intelligent Transportation & Monitoring Wireless LLC (ITL), Telesaurus-VPC, LLC, and Telesaurus Holdings GB LLC (collectively, Petitioners), seeking reconsideration of an *Order*¹ by the Public Safety and Critical Infrastructure Division (PSCID or Division)² denying (a) the Petitioners' petition to deny (PTD) the above-captioned application filed by Paging Systems, Inc. (PSI) for Multiple Address Systems (MAS) licenses for which it was the high bidder in Auction No. 59, and (b) the Petitioners' petition for reconsideration (PFR) of the Division's grant³ to PSI of a waiver of the Auction No. 59 long-form filing deadline.⁴ For the reasons discussed below, we deny the Petition.

2. *Background.* PSI was the high bidder for sixteen MAS licenses offered in Auction No. 59.⁵ PSI filed its long-form application on July 8, 2005, approximately one month after the June 9, 2005 deadline for filing such applications, as set forth in the *Auction Closing PN*. PSI therefore requested a waiver of the long-form filing deadline.⁶ On October 13, 2005, the Division granted the waiver request, concluding that PSI had demonstrated that such relief was warranted under Section 1.925(b)(3) of the

¹ Paging Systems, Inc., *Order*, 21 FCC Rcd 3032 (WTB PSCID 2006) (2006 *Order*).

² Pursuant to a reorganization effective September 25, 2006, certain duties of the Public Safety and Critical Infrastructure Division were assumed by the Mobility Division. See Establishment of the Public Safety and Homeland Security Bureau, *Order*, 21 FCC Rcd 10867 (2006).

³ Letter dated Oct. 13, 2005, from Jeffrey S. Cohen, Deputy Chief, PSCID, to Audrey P. Rasmussen, Esq., Counsel for Paging Systems, Inc., 20 FCC Rcd 16194 (*Waiver Order*).

⁴ Warren C. Havens, Intelligent Transportation & Monitoring Wireless LLC, Telesaurus-VPC, LLC, and Telesaurus Holdings GB LLC, Petition for Reconsideration (filed April 24, 2006) (Petition). Also before us are an Opposition to Petition for Reconsideration filed by PSI on May 8, 2006 (Opposition), and a Reply to Opposition to Petition for Reconsideration filed by the Petitioners on May 19, 2006 (Reply).

⁵ See Multiple Address Systems Auction Closes: Winning Bidders Announced for Auction No. 59, *Public Notice*, 20 FCC Rcd 9551, Attachment A (WTB 2005) (*Auction Closing PN*).

⁶ See Letter dated July 7, 2005, from Audrey P. Rasmussen, Counsel for Paging Systems, Inc., to Catherine W. Seidel, Acting Chief, Wireless Telecommunications Bureau.

Commission's Rules⁷ because it would not undermine the purpose of Section 1.2107(c), the rule which requires the timely filing of long-form applications,⁸ and would serve the public interest.⁹ The Division explained that "[a]n underlying purpose of post-auction application deadlines is to ensure that winning bidders satisfy the Commission's qualification and eligibility requirements in a timely manner and so avoid 'delays in the deployment of new services to the public that would result from litigation, disqualification, and re-auction.'"¹⁰ That purpose would not be undermined by granting a waiver to PSI, the Division reasoned, because PSI had complied with all pre-auction filing requirements in Auction No. 59, including timely submission of its upfront payment; was found to be a qualified bidder; and had timely satisfied both its down payment and final payment obligations.¹¹ The Division further concluded that granting PSI a waiver of the long-form deadline would serve the public interest because it would facilitate the ability of the company to expand service to its existing customers.¹² Finally, the Division noted that its decision was consistent with Commission precedent granting waiver relief for minor delinquencies that do not disrupt the auction process or delay the deployment of service.¹³

3. The Petitioners argued in both the PTD and the PFR that the Division erred in finding that a waiver was warranted in these circumstances.¹⁴ The Petitioners contended that granting a waiver to PSI simply because PSI's counsel neglected to file a timely application would create a precedent that would encourage other applicants to likewise file applications after the deadline, would undermine the purpose of the filing deadline, and would be unfair to applicants who did file their applications on time.¹⁵ The Petitioners also argued that PSI should be disqualified to be a Commission licensee under the Commission's character qualifications policy, incorporating by reference several pleadings the Petitioners had filed in other proceedings pertaining to PSI.¹⁶

4. The Division rejected all of the Petitioners' arguments. It found no merit to the Petitioners' argument that granting a waiver in these circumstances would be unprecedented, and noted that the Petitioners failed to even attempt to distinguish the instant case from the cases relied upon in the *Waiver Order* as precedent.¹⁷ The Division also found that the Petitioners' arguments concerning character qualifications – which did not allege any misconduct by PSI with respect to Auction No. 59 or the MAS service – did not constitute grounds to deny the instant application, and were more appropriately

⁷ 47 C.F.R. § 1.925(b)(3). Section 1.925(b)(3) provides that the Commission "may grant a request for waiver if it is shown that ... (i) [t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) [i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative."

⁸ 47 C.F.R. § 1.2107(c).

⁹ See *Waiver Order*, 20 FCC Rcd at 16195-96. The Division also granted waivers of the long-form filing deadline to three other Auction No. 59 applicants. See *2006 Order*, 21 FCC Rcd at 3033 n.10.

¹⁰ See *Waiver Order*, 20 FCC Rcd at 16195, quoting Implementation of Section 309(j) of the Communications Act, Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348, 2382 ¶ 197 (1994).

¹¹ *Id.*

¹² *Id.* at 16195-96.

¹³ *Id.*, citing *Silver Palm Communications, Inc., Order*, 17 FCC Rcd 6606 (WTB CWD 2002) (*Silver Palm*); *City Page & Cellular Services, Inc., et al., Order*, 17 FCC Rcd 26109 (WTB CWD 2002) (*City Page*).

¹⁴ See, e.g., PTD at 1-2; PFR at 1-5

¹⁵ See, e.g., PTD at 2; PFR at 3.

¹⁶ See, e.g., PTD at 2-4; PFR at 5-6.

¹⁷ See *2006 Order*, 21 FCC Rcd at 3035 ¶ 7.

addressed in the pending proceedings relating to the licenses and applications concerning which the Petitioners alleged that PSI acted in a manner reflecting its unfitness to be a Commission licensee.¹⁸ PSI's application was granted on March 29, 2006.¹⁹

5. The Petitioners seek reconsideration of the Division's *Order* because, they argue, the *Order* is contrary to established Commission policy with respect to late-filed applications; fails to address "essential facts and arguments" in the PTD and PFR with particular respect to how the waiver gives PSI an unfair advantage and thereby harms the Petitioners and others; and relies on precedent that not only is inapplicable to the instant case but is also "incorrect as a matter of controlling law and thus should not be followed."²⁰ The Petitioners also argue that that Commission's treatment of them is "unfair, arbitrary, and capricious," and that the public interest component of the Section 1.925 waiver standard is unconstitutional on its face.²¹ Finally, the Petitioners argue that the *Order* should have addressed their arguments concerning PSI's character qualifications.²²

6. *Discussion.* Reconsideration is appropriate only where the petitioner either demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.²³ A petition for reconsideration that simply reiterates arguments that were previously considered and rejected will be denied.²⁴ We find that the Petition neither demonstrates material error or omission in the *Order*, nor raises any new facts unavailable to the Petitioners when they filed the PTD. In addition, we find that the new arguments raised by the Petitioners for the first time in the Petition are unpersuasive.

7. The Petitioners reiterate that PSI's delay in filing the application must have been

¹⁸ *Id.* at 3035-37 ¶¶ 8-10. The Division observed that, notwithstanding the Petitioners' allegations against PSI in those other proceedings, there had been no finding in any proceeding that PSI should be disqualified to hold Commission licenses, and that if the Commission were to conclude in the future that PSI has engaged in actionable misconduct, "it retains discretion to take whatever remedial action it deems appropriate under the circumstances presented, including revocation of the instant license." *Id.* at 3036-37 ¶ 10.

¹⁹ See Wireless Telecommunications Bureau Announces the Grant of Five Multiple Address Systems Licenses - Auction No. 59, *Public Notice*, 21 FCC Rcd 3517 (WTB 2006).

²⁰ See Petition at 2.

²¹ *Id.* at 2-3.

²² *Id.* at 14.

²³ See *WWIZ, Inc.*, 37 F.C.C. 685, 686 ¶ 2 (1964) (*WWIZ*), *aff'd sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). PSI argues that the Petition should be dismissed outright as repetitious pursuant to Section 1.106(k)(3) of the Commission's Rules, which provides that a petition for reconsideration of the denial of a prior petition for reconsideration "may be dismissed by the staff as repetitious." Opposition at 3, *citing* 47 C.F.R. § 1.106(k)(3). We agree with PSI that the Petition is subject to dismissal insofar as it seeks reconsideration of the Division's decision to grant the waiver of the long-form filing deadline to PSI. In this case, however, we will exercise our discretion to address the Petition on the merits. See *Sequoia Cablevision, Memorandum Opinion and Order*, 58 F.C.C. 2d 669 (1976) ("we note that the language of Section 1.106(k)(3) of the Rules is permissive, not mandatory"). Given that the decisions to affirm the grant of a waiver to PSI and to deny the Petitioners' petition to deny PSI's Auction No. 59 application were addressed in a single order, we believe the goals of administrative efficiency and finality that underlie Section 1.106(k)(3) will not be undermined by addressing the merits of the Petition.

²⁴ *WWIZ*, 37 F.C.C. at 686 ¶ 2 (stating that "it is universally held that rehearing will not be granted merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken"); see also 47 C.F.R. § 1.106(c).

deliberate, and was intended to give PSI an unfair advantage.²⁵ This allegation is entirely speculative, with no evidentiary support whatsoever. Contrary to the Petitioners' supposition that the late filing can be explained only as a deliberate tactical decision by PSI, the Division noted in the *Order* that "the absence of any evidence of bad faith" on the part of PSI was one factor militating in favor of granting waiver relief.²⁶ We still see no basis to impute bad faith to PSI or to find that the late filing of the application was due to anything other than inadvertence.²⁷

8. The Petitioners also provide no reason to now conclude that, in contrast to the determinations in the *Waiver Order* and *Order*, the grant of waiver relief to PSI in these circumstances runs counter to Commission precedent. The Petitioners' claim that the grant of a waiver to PSI is inconsistent with the Wireless Telecommunications Bureau's denial of another party's request for waiver of an Auction No. 59 filing deadline is unavailing.²⁸ The applicant in that case requested a waiver of the Auction No. 59 *short-form* filing deadline six weeks after that deadline and less than one week before the scheduled auction start date.²⁹ Grant of the requested waiver clearly would have delayed the auction process, while the grant of waiver relief to PSI likely delayed the processing of no application but its own. In addition, we are not persuaded by the Petitioners' new arguments that the Division should have distinguished or rejected the prior precedent of the *Silver Palm* and *City Page* cases.³⁰ The Petitioners seek to distinguish those decisions on the grounds that they involved delays in filing the long-form application of fourteen and fifteen days, respectively, whereas PSI was twenty-nine days late.³¹ We find it more significant that in this case, as in those cases, the record reveals both that PSI took quick action to rectify the omission upon learning of it, and that the lateness of the filing likely did not significantly delay or adversely affect the post-auction licensing process.³² Although the Petitioners now belatedly raise a

²⁵ See Petition at 4, 7; Reply at 6-7; compare with, e.g., PTD at 2 (Petitioners first making the argument that "it is not believable" that PSI's failure to file a timely long-form application was inadvertent).

²⁶ See 2006 *Order*, 20 FCC Rcd at 3035 ¶ 7.

²⁷ We also find the Petitioners' arguments regarding the advantages of filing a long-form application late to be less than compelling. The Petitioners argue, *inter alia*, that the late filing gave PSI additional time to determine whether it was in its self-interest to proceed to licensing, and provided it with additional time in which to complete construction of the authorized facilities and initiate service (since the construction period begins with issuance of the license). See, e.g., Petition at 4, 7-8. As PSI notes, however, there are significant advantages to having a head start over other applicants and competitors in providing service. See Opposition at 6. We also are unpersuaded that a one-month delay in filing an application would be of meaningful benefit to an applicant in achieving compliance with a construction requirement based on demonstrations of substantial service at five- and ten-year benchmarks. See 47 C.F.R. § 101.1325(b) (providing that a geographic area MAS licensee "must provide service to at least one-fifth of the population in its service area or 'substantial service' within five years of the license grant ... [and] must make a showing of continued 'substantial service' within ten years of the license grant"). Finally, given the Petitioners' frequent practice of opposing PSI filings, we question their assumption that, had PSI filed timely, its application would have been processed at the same time as the other Auction No. 59 bidders' applications, which were granted on October 13, 2005. See Petition at 7 n.15.

²⁸ See Petition at 4-7, citing Letter, adopted April 25, 2005, from Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, to Mr. Ameer Flippin, 20 FCC Rcd 8750 (*Flippin Letter*); see also Reply at 4-5.

²⁹ See *Flippin Letter*, 20 FCC Rcd at 8750.

³⁰ We note, moreover, that there is no reason why the Petitioners could not have made those same arguments earlier, in the PTD and PFR. It is well settled that a party may not "sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence." See, e.g., *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

³¹ See Petition at 10.

³² See 2006 *Order*, 21 FCC Rcd at 3035 ¶ 7. We also disagree with the Petitioners' argument that the existence of competitors to PSI in the Fresno and Redding, California markets distinguishes the instant case from *Silver Palm* (continued....)

collateral challenge to the validity of those earlier waiver decisions as inconsistent with judicial precedent, they offer no analysis in support of that contention.³³

9. We also find no merit in the Petitioners' contention that the *Order* failed to address "essential facts and arguments" in the Petitioners' pleadings "and in Commission records."³⁴ The Petitioners claim that the *Order* did not give consideration to all of their arguments regarding why granting a waiver to PSI in these circumstances would create a bad precedent, one that would provide PSI with unfair advantages with respect to, *e.g.*, meeting construction requirements, while harming the Petitioners and other of PSI's competitors, and creating an incentive for future applicants to deliberately file their long-form application late.³⁵ As noted *supra*, however, the Division determined that, contrary to the Petitioners' arguments, grant of the requested waiver to PSI was fully consistent with precedent, and would, on balance, serve the public interest for the same reasons that those earlier waivers were found to be in the public interest.³⁶ In addition, we find no merit in the Petitioners' argument that the grant of the waiver to PSI will encourage other applicants to deliberately file their applications late for tactical purposes. Any such applicant would be risking dismissal of its application and/or other sanctions³⁷ since, as the *Order* expressly stated, the grant of the waiver in this case was based in part on the absence of any evidence of bad faith on the part of PSI.³⁸

10. The Petitioners also contend that grant of the requested waiver to PSI reflects a pattern of disparate and unfavorable treatment accorded to the Petitioners vis-à-vis their competitors.³⁹ However, the Petitioners do not claim to have been denied a waiver in circumstances similar to those in this case, and attempt to substantiate their argument by citing only a decision denying their request to extend the period for filing reply comments in a rulemaking proceeding.⁴⁰ They thus fail to demonstrate the existence of any unjustified disparate treatment. We likewise find that the Petitioners' additional new argument, that the public interest component of the Section 1.925 waiver standard is "facially

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and *City Page* so as to alter the waiver analysis. See Petition at 11. As noted by the Division in the *Waiver Order*, granting the requested waiver to PSI would serve the public interest by facilitating the expansion of PSI's service to its existing customers in those markets. See *Waiver Order*, 20 FCC Rcd at 16195-96.

³³ See Petition at 11.

³⁴ See *id.* at 7-9.

³⁵ *Id.*

³⁶ See *2006 Order*, 21 FCC Rcd at 3035 ¶ 7. The Petitioners also state that the *Order* "erred in suggesting that PSI has already paid for the licenses, since it is only upon submission and acceptance of the long form that the payment for the licenses is consummated" See Petition at 8. The point, however, is that, as in the cases cited as precedent for granting a waiver, the waiver applicant had timely satisfied its down payment and final payment obligations in advance of the long-form filing deadline. *2006 Order*, 21 FCC Rcd at 3033 ¶ 4, 3035 ¶ 7. This circumstance supported the conclusion that grant of the waiver likely would not delay the post-auction licensing process, and refutes the Petitioners' suggestion that PSI delayed filing the long-form application due to financing difficulties.

³⁷ See, *e.g.*, Frank J. Neely, *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture*, 21 FCC Rcd 8010 (MB 2006) (assessing forfeiture for late filing of long-form application).

³⁸ See *2006 Order*, 21 FCC Rcd at 3035 ¶ 7.

³⁹ See Petition at 11-13. According to the Petitioners, "the Bureau has applied a harsh and unjustifiable standard to Petitioners and a liberal and unjustifiable standard to PSI. Such unequal, disparate and anti-competitive treatment renders the Order defective...." *Id.* at 12-13.

⁴⁰ *Id.* at 12, citing MariTEL, Inc. and Mobex Network Services, LLC, *Order*, 19 FCC Rcd 23617 (WTB PSCID 2004).

unconstitutional,” does not merit discussion.⁴¹

11. Finally, the Petitioners assert that the Division should have addressed PSI’s character qualifications.⁴² Contrary to the Petitioners’ interpretation, however, the *Order* did not conclude that the conduct of an auction participant with respect to other auctions and other services is not relevant to whether the applicant is qualified to hold the licenses at issue in that auction. Rather, as noted *supra*, the Division determined that the challenges to PSI’s basic character qualifications raised by the Petitioners in other proceedings were better addressed in those separate proceedings, and that the Commission retained authority to take appropriate remedial action, including revocation of PSI’s Auction No. 59 license, if the Commission were to determine in the future that PSI should be disqualified as a licensee.⁴³ Those proceedings remain more appropriate venues than the instant proceeding for the Petitioners to pursue these arguments.

12. *Conclusion and Ordering Clauses.* The Petitioners have not identified any error in the Division *Order* denying reconsideration of the Division *Waiver Order*, and have not otherwise provided any basis for finding that the Division should not have granted PSI a waiver of the long-form filing deadline for Auction No. 59. In addition, the Petitioners have not introduced any arguments or facts that would persuade us that the Division should not have granted PSI’s application for the MAS licenses for which it was the high bidder in Auction No. 59. We therefore deny the Petition.

13. ACCORDINGLY, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission’s Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Warren C. Havens, Intelligent transportation & Monitoring Wireless LLC, Telesaurus-VPC, LLC, and Telesaurus Holdings GB LLC on April 24, 2006, IS DENIED.

14. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission’s Rules, 47 C.F.R. § 0.131, 0.31.

FEDERAL COMMUNICATIONS COMMISSION

Roger S. Noel
Chief, Mobility Division
Wireless Telecommunications Bureau

⁴¹ See Petition at 13. Petitioners’ argument, which is not supported with a single legal citation, appears to be that granting a waiver of a rule adopted pursuant to a notice-and-comment rulemaking proceeding denies the due process rights of parties that must comply with the rule. Among other defects, this argument overlooks the fact that the rule authorizing the grant of waiver relief, Section 1.925, was itself adopted pursuant to a notice-and-comment rulemaking proceeding.

⁴² See Petition at 14.

⁴³ See 2006 *Order*, 21 FCC Rcd at 3035-37 ¶¶ 8-10.